TAN YAP SENG

v.

KETUA POLIS NEGARA & ORS.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL APPLICATION NO. 44-10-91]
4 MAY 1991

PREVENTIVE DETENTION: *Mandatory requirement - Non compliance - Submission of report to Minister - Onus on the executive - Date of report not stated - Effect of - 'forthwith' - Interpretation of Dangerous Drugs (Special Preventive Measures) Act 1985, s. 3(2)(C).*

The applicant T was detained under a detention order issued pursuant to s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 (the Act).

It was the contention of defence Counsel that there was non-compliance with the mandatory requirements of proviso (c) to s. 3(2) of the Act as the designated Officer did not specify the date on which he submitted his report to the Minister.

Held:

[1] The word "forthwith" must be construed according to the circumstances of the case. Taking into account s. 3(2) of the Act which results in continued detention without trial, it would be wrong for the designated Officer to submit his report immediately for to do so could mean that he did not direct his mind to the particular circumstances of the case.

[2] In the absence of any evidence as to the actual date on which the designated Officer submitted his report to the Minister under s. 3(2) of the Act, the Court is not at liberty to presume that he had done so within the time limited.

[T's application for habeas corpus allowed.]

Cases referred to:
Re Tan Boon Liat [1977] 2 MLJ 108
Rev. Thomas Pelham Dale's Case [1880-8] 6 QBD 376

Legislation referred to:
Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3(1), (2)(c), 6(1)

Other source referred to:
Corpus Juris Vol. 26 p. 998

For the applicant - Tan Hock Chuan; Sykt. Kam Woon Wah
For the respondents - Noorbahri bin Baharuddin, Federal Counsel

JUDGMENT

Edgar Joseph Jr J:

This detainee was made the subject of a detention order by the Deputy Minister for Home Affairs acting pursuant to the powers conferred upon him by s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985, (the Act). The ground upon which the order was made was that he was involved in activities relating to the trafficking of dangerous drugs.

Before me, Counsel for the detainee has impugned the detention order and the detainee's detention thereunder on the ground of non-compliance with the mandatory requirements of proviso (c) to s. 3(2) of the Act. To put the matter in perspective it is necessary to reproduce subsection (1) and (2) of s. 3 of the Act; they read as follows:

> (1) Any police officer may, without warrant, arrest and detain, for the purpose of investigation, any person in respect of whom he has reason to believe there are grounds which could justify his detention under subs. (1) of s. 6.
>
> (2) Any person arrested and detained under this section may be detained in police custody for a period not exceeding sixty days without an order of detention having been made in respect of him under subs. (1) of s. 6:
>
> Provided that:
>
> (a) he shall not be detained for more than twenty four hours except with the authority of a police officer of or above the rank of Inspector;
>
> (b) he shall not be detained for more than forty eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent of Police;
>
> (c) he shall not detained for more than fourteen days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by the Inspector-General in that behalf and the Inspector-General or police officer so designated by him, as the case may be, shall forthwith report the same to the Minister.

In the context of Counsel's submissions, the following time table of events is relevant:

The detainee had been arrested on 19 January 1990, by Detective Lance Corporal Johari bin Chin for investigation under s. 3(1) of the Act. On 25 January 1990, Superintendent of Police Othman bin Talib, had submitted his report under proviso (c) to s. 3(2) of the Act to the Designated Officer Senior Assistant Commissioner of Police Osman bin Awal. By para. 4 of his affidavit dated 14 December 1990 (En.15) the designated officer has stated that he had forthwith (*seterusnya*) submitted his own report under proviso (c) to s. 3(2) of the Act to the Minister though the actual date when he did so was never specified.

Given these facts, it was submitted that although proviso (c) to s. 3(2) requires the submission of both the reports by the Superintendent of Police to the designated officer and that by the designated officer to the Minister to be done not later than the 14 day period limited thereunder, there was no evidence establishing on what date the designated officer had performed that duty with the ensuing consequence that there had been non-compliance with a mandatory statutory requirement.

On the other hand, the Federal Counsel who appeared on behalf of the respondents, submitted that given the above time table of events it could be reasonably presumed that the designated officer did perform the task of submitting his report to the Minister within the 14 day period limited by proviso (c) to s. 3(2). In particular, it was emphasised that having regard to the fact that the last day for the designated officer to submit his report to the Minister was 2 February 1990, the further fact that he had received the report under proviso (c) to s. 3(2) from the Superintendent of Police on 25 January 1990, and his assertion that he had "forthwith" submitted his report to the Minister, it could be safely be presumed that the time barrier concerned had been successfully surmounted.

First of all, I must say that it would be idle to pretend and it would be wrong to maintain that I am here dealing with a mere technical point because it is a point which touches a fundamental right of the citizen which has been more jealously preserved than any other.

Secondly, it is familiar proposition, sometimes overlooked, with possible confusion and resulting injustice, that cases are decided on evidence and not on surmise or conjecture.

Turning to the issue which arises for decision there can be no doubt that the onus is upon the executive to demonstrate that the subject's detention has been procured by steps "all of which were entirely regular" or to put it another way, to show that "every step in the process which led to such detention was followed with the extreme regularity". (See *Reverand Thomas Pelham Dale's* case [1880-8] 6 QBD 376 per Brett LJ and Cotton LJ applied by Lee Hun Hoe CJ (Borneo) when speaking for the Federal Court in *Re Tan Boon Liat* [1977] 2 MLJ 108, 114.

Keeping in the forefront of my mind the principles aforesaid, I am not persuaded that the executive has in this case discharged the onus of demonstrating that the designated officer had submitted his report to the Minister within the time limited by proviso (c) to s. 3(2). The designated officer has merely stated that he submitted that report **forthwith** upon receipt by him of the report from the Superintendent of Police without condescending to state what the actual date was when he submitted his report to the Minister. But the Federal Counsel submitted that the word "forthwith" could be construed as "immediately".

In my view, the word "forthwith" must be construed according to the circumstances. In the *Corpus Juris*, Vol. 26, p. 998, the position in thus stated:

> Although the term has received a strict construction, ordinarily it is not to be strictly construed, but should receive a liberal or reasonable construction. Some regard must be had to the nature of the act or thing to be performed and the circumstances of the case.

In the context of proviso (c) to s. 3(2) in particular, not forgetting that if correctly invoked, it would result in the continued detention of a subject without trial, my view is that it would, *prima facie*, be wrong for the designated officer to submit his report to the Minister immediately. By "immediately", I mean automatically without any interval of time, for had he done so, it could be argued, with considerable justification, that he could not have directed his mind to the particular circumstances of the detainee's case. In other words, he would lay himself open to the attack that he had acted as a mere rubber stamp.

It follows that in the absence of any evidence as to the actual date when the designated officer submitted his report under proviso (c) s. 3(2) of the Act I do not consider that I am at liberty to presume that he had done so within the time limited. In a matter concerning the liberty of the subject - always a priceless asset - the Court should walk very warily.

The result therefore is that this application for *habeas corpus* succeeds and the detainee must be set at liberty forthwith.

Also found at [1991] 2 CLJ 1400